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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

NO. 245

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and THEODORE J. ISAACS, Director of Revenue,

Defendants-Appellants.

vs.

UNITED STATES OF AMERICA and OLIN MATHIESON CHEMICAL CORPORATION,

Plaintiffs-Appellees,

(APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.)

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

THE OPINION AND JUDGMENT BELOW.

The opinion of the District Court for the Northern District of Illinois, Knoch, Circuit Judge, and LaBuy and Robson, District Judges, sitting *en banc* under the provisions

of Sections 1345, 1331 and 1332 of the Judicial Code (28 USC., 1331, 1332 and 1345) is reported in 191 F. Supp. 723. It is reprinted in full as Appendix I to this Jurisdictional Statement, pp. 31 to 40.

The judgment of injunction is not reported. It is reprinted as Appendix II to this Jurisdictional Statement, pp. 41 to 49.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Nature of the Proceeding and The Statute Pursuant To Which It is Brought.

The Judgment Order Appealed From.

The bench of three judges above mentioned, Knoch, Circuit Judge, and LaBuy and Robson, District Judges, sitting *en banc*, under the provisions of the Judicial Code cited above, have enjoined appellants, Illinois' Department of Revenue and her Director of that Department, from collecting Illinois' Retailers' Occupation Tax (Ill. Rev. Stats. 1959, Ch. 120, Pars. 440-452, Vol. II, pp. 1388 to 1400), from Illinois retailers

> "against the plaintiff, Olin Mathieson Chemical Corporation [a private corporate *entrepreneur* that sells personal property purchased in Illinois to contractors for use in the execution of contracts with the Federal Government], or anyone else with respect to any sales of tangible personal property which any of them have made, or hereafter may make to the United States, or any of its agencies or instrumentalities, or with respect to any proceeds received from the United States with respect to any such sales."

The sweep of the *judgment order* is categorical and forever interdicts Illinois from imposing her Retailers' Occupation Tax upon *any* Illinois retailer with respect to the proceeds of *any sale* to the United States Government or *any* contractor with that Government, *notwithstanding any change in Illinois' law.*

The district court's *opinion*, however, makes it clear that the *reason* for the injunction was the fact that *at the time the decree was entered*, Illinois exempted from the measure of the tax

> "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of * * * sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes." (Ill. Rev. Stats. 1959, Ch. 120, Par. 441, Vol. II, p. 1389.)

Although Illinois, her Department of Revenue and the Director of that Department still insist that the district court's opinion and judgment were erroneous when the opinion was pronounced and the judgment was entered, her chief reliance for reversal now will be on the fact that Illinois no longer exempts from the tax sales to the State of Illinois, her political instrumentalities, municipal corporations and charities.

The change in Illinois' law, which eliminates the basis for the trial court's opinion and for the judgment appealed from, was wrought on May 10, 1961, when the Supreme Court of Illinois held that the statutory provision which purported to exempt sales to that State, her agencies, municipalities and corporations, *was itself unconstitutional* and that from the date of that decision forward, no sale

that would otherwise measure the tax is immune therefrom because of the Federal, State, municipal or charitable character of the purchaser or the ultimate user of the merchandise sold.

The United States and Olin Mathieson Chemical Corporation, a private corporate *entrepreneur*, brought this suit against the Department of Revenue of the State of Illinois and the then Director of that Department to enjoin the defendants from measuring or collecting Illinois' retailers' occupation tax (Ill. Rev. Stats. 1959, Ch. 120, Pars. 440-452, Vol. II, pp. 1388 to 1400,) with respect to gross receipts on sales of tangible personal property to the United States Government or to persons who, such as the Olin Mathieson Company, use the property in performing contracts with the Federal Government, the Federal Government bearing the economic burden of the tax, so long as Illinois exempts from the measure and collection of that tax the gross receipts from

> "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes". (Ill. Rev. Stats. 1959, Ch. 120, Par. 441, p. 1389.)

The United States and Olin Mathieson Company amended their complaint to assert a categorical immunity from the Illinois retailers' occupation tax with respect to all sales to the Federal Government or its contractors, irrespective of whether Illinois did or did not exempt from the tax the proceeds of similar sales to the State, its political instrumentalities, municipal corporations and charities.

This court's jurisdiction is invoked under Section 1253 of the Judicial Code (28 USC., Sec. 1253), which permits direct appeals to this court from decisions of district courts in which three judges sit *en banc*.

The Date of the Judgment Sought To Be Reviewed, The Time Of Its Entry And The Date Of The Filing Of The Notice Of Appeal.

The judgment sought to be reviewed and the opinion supporting that judgment were dated, entered and filed on February 24, 1961. Appellants filed their notice of appeal on April 24, 1961, 59 days after the date and entry of the judgment appealed from and of the opinion sought to be reviewed.

THE STATUTORY PROVISION CONFERRING THIS COURT'S JURISDICTION ON THIS APPEAL.

This court's jurisdiction on this appeal is conferred by Section 1253 of the Judicial Code (28 USC., Sec. 1253), which provides in pertinent part:

> "Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

Cases Sustaining This Court's Jurisdiction Of This Appeal.

Livingston v. *United States*, 364 U. S. 281, *affirming United States* v. *Livingston*, 179 F. Supp. 9, a case relied upon by appellees on the merits, sustains this court's jurisdiction on this appeal.

In the *Livingston* case this court entertained a direct appeal from a decision of a district court, three judges sitting *en banc*, enjoining the collection of a State tax that was alleged to be unconstitutionally laid upon an instrumentality of the United States.

The State Statute The Validity Of Which Is Involved Insofar As That Statute Affects The Interests Or Claims Of Interests Of Appellees.

This case involves the validity of the Illinois Retailers Occupation Tax Act (Ill. Rev. Stats. 1959, Ch. 120, Pars. 440-453, Vol. II, pp. 1388-1400).

Appellees challenge only the validity of Section 2 of that Act as it stood from July 1, 1953, until the exemptive provision complained of in this case was held unconstitutional on May 10, 1961, (*People ex rel. Holland Coal Co.* v. *Isaacs*, not yet officially reported.

That section (Ill. Rev. Stats. 1959, Ch. 120, Par. 441, p. 1389) is in full as follows, the allegedly unconstitutional 1953 Amendment language being printed in appellants' italics:

> "Sec. 2. *Tax on business selling tangible personal property at retail—Exemption.*—A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 2½% of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1959, or after June 30, 1961, and at the rate of 3% of the gross receipts from such sales after June 30, 1959, and prior to July 1, 1961, *excluding, however, from said gross receipts, the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corpo-*

ration, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

THE QUESTIONS PRESENTED.

The questions presented are:

Questions As To The District Court's Jurisdiction Of This Case Under Section 1341 Of The Judicial Code (28 USC., Sec. 1341).

1. DOES ILLINOIS LAW AFFORD THE PLAINTIFFS "A PLAIN, SPEEDY AND EFFICIENT REMEDY" FOR CONTESTING THE TAXES INVOLVED IN THIS CASE WITHIN THE MEANING OF SECTION 1341 OF THE JUDICIAL CODE (U. S. C., TIT. 28, SEC. 1341)?

2. IF THE QUESTION ABOVE STATED IS ANSWERED "YES", DOES SECTION 1341 OF THE JUDICIAL CODE APPLY TO THE UNITED STATES AS A PLAINTIFF IN THIS CASE?

3. WITH RESPECT TO THE PLAINTIFF OLIN MATHIESON CHEMICAL CORPORATION, IS THIS CASE, IN WHICH THE DEPARTMENT OF REVENUE IS A DEFENDANT, A SUIT AGAINST THE STATE OF ILLINOIS WITHIN THE INHIBITION UPON THIS COURT'S JURISDICTION OF THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. IS THE UNITED STATES, WHOSE OBLIGATION TO REIMBURSE OLIN MATHIESON CHEMICAL CORPORATION AND OTHER RETAILERS FOR THE TAXES INVOLVED IN THIS CASE IS PURELY CONTRACTUAL AND WHOLLY DERIVATIVE, A PROPER PLAINTIFF IN THIS CASE?

The Question On The Merits Presented By The Judgment Appealed From As Of The Date Of The Entry Of That Judgment.

5. IF THE 1953 AMENDMENT TO ILLINOIS' RETAILERS' OCCUPATION TAX ACT EXEMPTING FROM THE MEASURE OF THAT TAX SALES TO THE STATE OF ILLINOIS, HER INSTRUMENTALITIES, MUNICIPALITIES AND CHARITIES IS VALID UNDER THE FEDERAL CONSTITUTION, DOES THAT EXEMPTION UNCONSTITUTIONALLY DISCRIMINATE AGAINST THE UNITED STATES AND THEREFORE UNCONSTITUTIONALLY INFRINGE FEDERAL SOVEREIGNTY?

The Question Presented By The Decision Of The Supreme Court Of Illinois Holding The Challenged Exemption Unconstitutional.

6. ON MAY 10, 1961, THE SUPREME COURT OF ILLINOIS HELD ILLINOIS' 1953 EXEMPTION FROM THE MEASURE OF THE TAX SALES TO ILLINOIS, HER INSTRUMENTALITIES AND CHARITIES UNCONSTITUTIONAL AS A DISCRIMINATION AGAINST THE UNITED STATES AND AN INFRINGEMENT OF FEDERAL SOVEREIGNTY. ILLINOIS' DIRECTOR OF REVENUE HAS PROMULGATED REGULATIONS REFUSING RECOGNITION OF CLAIMS TO EXEMPTION FROM THE TAX WITH RESPECT TO SALES TO ILLINOIS, HER INSTRUMENTALITIES AND CHARITIES. ILLINOIS NO LONGER EXEMPTS SUCH SALES FROM THE TAXING STATUTE. DOES ILLINOIS' REPUDIATION OF THE CHALLENGED EXEMPTION REMOVE THE CLAIMED DISCRIMINATION AGAINST THE UNITED STATES GOVERNMENT AND INFRINGEMENT OF FEDERAL SOVEREIGNTY AND THEREFORE REQUIRE THE VACATION OF THE JUDGMENT APPEALED FROM?

STATEMENT OF THE CASE.

Illinois' first Retailers' Occupation Tax Act was passed in 1933. That Act imposed a tax measured by the gross receipt from sales of "all tangible personal property at retail" except that it expressly exempted from the reach of the tax the proceeds of sales by agricultural producers of food who sold their own produce and livestock at retail. (Sessions Laws, 1933.)

This first 1933 Retailers' Occupation Tax Act was not published elsewhere than in the session laws, cited above. It was held unconstitutional because, so the Supreme Court of Illinois held, it discriminated in favor of the retailers merely because they produced their own foodstuffs and against retailers who did not produce foodstuffs and did produce and sell at retail merchandise other than foodstuffs.

The same session of the Illinois General Assembly that had passed the first 1933 Act promptly passed a similar Act, omitting the unconstitutional exemption. (Sessions Laws, 1933, Ill. Rev. Stats., 1933, p. 2453.)

This Act was held constitutional by the Supreme Court of Illinois in *Winter* v. *Barrett*, 352 Ill. 441, 186 N. E. 113.

In 1941, this court, deciding *Alabama* v. *King & Boozer*, 314 U. S. 1, held that an otherwise constitutional tax laid by Alabama upon vendors of personal property and measured by the gross receipts from the sale of such property did not infringe Federal sovereignty merely because the tax was measured by receipts from sales of personal property to contractors who used that property in the performance of contracts with the United States, the United States absorbing and bearing the economic burden of the

tax under "cost plus contracts". This court has never overruled *Alabama* v. *King & Boozer*, 314 U. S. 1.

The United States continues to absorb and bear the burden of all retailers' occupation taxes that are passed on to its contractors by vendors who are subject to State taxes measured by the gross receipts from retail sales *so long as the State tax does not discriminate between sales to the United States Government and contractors with that Government, on the one hand, and sales to purchasers other than the United States Government and its contractors, on the other hand.* But in 1953, the General Assembly of Illinois amended Section 2 of the Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. 1953, 1955, 1957, 1959, Ch. 120, Par. 442, Vol. II, p. 1390) so as to exempt from the measure of the tax -

> "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes". (Ill. Rev. Stats. 1959, Ch. 120, Par. 441, Vol. II, p. 1389.)

From the effective date of this 1953 Amendment to the Illinois Retailers' Occupation Tax Act, July 1, 1953, until the date of the temporary injunction entered in this case, September 1, 1960, Illinois' Department of Revenue and her successive Directors of that Department, continued to collect the Illinois retailers' occupation tax with respect to sales to the United States Government and its contractors although they exempted similar sales to the State of Illinois, her instrumentalities, municipalities and charities.

On August 29, 1960, the United States and Olin Mathieson Chemical Corporation, a private corporate *entrepreneur*, organized under the laws of the State of Virginia, filed the instant suit, relying upon this court's decision in *Phillips Chemical Co.* v. *Dumas School Dist. of Texas*, 361 U. S. 376, and *Livingston* v. *Illinois*, memorandum opinion, 364 U. S., 281, *affirming United States* v. *Livingston*, 179 F. Supp. 9, and contending that *inasmuch as Illinois exempts from her tax sales to the State, her instrumentalities, municipal corporations and charities*, the continued exaction of the tax from Illinois retailers who sell to the United States and contractors with the United States discriminates against the United States and infringes Federal sovereignty.

A bench of three judges, Knoch, Circuit Judge, LaBuy and Robson, District Judges, sitting *en banc*, under Section 1253 of the Judicial Code, (28 USC., Sec. 1253), granted a temporary injunction restraining the collection of the tax with respect to sales to the United States and contractors with the United States.

Thereafter the United States and Olin Mathieson Company amended their complaint to assert a categorical immunity from the Illinois retailer's occupation tax with respect to all sales to the Federal Government or its contractors.

The case was decided upon the pleadings, briefs and oral arguments. There were and are no controverted issues of fact.

The District Court's Opinion.

The District Court sustained the contention of appellees, announced the opinion of which review is sought on this appeal and entered the judgment appealed from.

The opinion did not even notice the appellees' auxiliary contention, first suggested by their amendment to the complaint, that any State tax measured by gross receipts from sales by retailers unconstitutionally infringes Federal sovereignty if the purchaser is either the United States Government or a contractor with that Government.

But the District Court's opinion, deciding the only substantive question that that opinion noticed, said (191 F. Supp. 723, *Appendix I, post*, pp. 31-40):

> "A reasonable consideration of difference or policy between these retailers must exist otherwise the classification is either capricious or arbitrary. *Phillips Co.* v. *Dumas School Dist., supra*, page 383. No enlightenment has been offered as a basis for the differentiation. It is difficult for us to perceive a reasonable distinction which grants one freedom from contributing to the cost of government and imposes the burden upon the other. Further, the imposition of the tax upon one and not the other permits the State to deal with retailers at a lower cost and imposes an increased cost upon the Federal Government dealing with the same class of persons. Assuming that the statutory exemption may have the laudable public purpose of reducing governmental costs, it is equally applicable to the Federal Government thus benefiting all citizens of the United States, including the citizens of the State of Illinois.
>
> "Not only is the Federal Government discriminated against as a governmental unit in contrast to the exemption granted
>
> 'the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or

institution of any of the governmental units aforesaid'

but it is further discriminated against in contrast with many non-governmental entities, specifically

'any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes.'"

The District Court's Judgment of February 24, 1961.

The District Court's judgment now appealed from

"permanently restrained and enjoined from the making or enforcing any assessment or collection under, or in any other way applying or enforcing the provisions of Section 2 of the Illinois Retailers' Occupation Tax Act, Act of June 28, 1933, (Ill. Rev. Stat. 1959, Ch. 120, Sec. 441), against the plaintiff, Olin Mathieson Chemical Corporation, or anyone else with respect to any sales of tangible personal property which any of them have made, or hereafter may make to the United States, or any of its agencies or instrumentalities, or with respect to any proceeds received from the United States with respect to any such sales."

The Supreme Court of Illinois has now held Unconstitutional Illinois' Statutory Exemption of Sales to State, Municipal and Charitable Instrumentalities. The Basis for the District Court's Judgment Has Disappeared.

On May 10, 1961, the Supreme Court of Illinois, speaking unanimously, decided the case of *The People of the State of Illinois ex rel. Holland Coal Company* v. *Isaacs*, not yet reported, that Court's No. 36480, opinon reprinted in full, Appendix III, *post*.

In that case, the Supreme Court of Illinois agreed with the opinion of the district court in the instant case, held that

if the 1953 Amendment exempting the proceeds of sales to Illinois, her municipalities and charities was constitutional, that exemption discriminated against the Federal Government, but held that *the entire exemption was itself unconstitutional.*

The Supreme Court of Illinois held invalid those regulations of the Department of Revenue that purport to exempt from the tax sales to Illinois, her municipalities and charities.

The concluding opinion of the Supreme Court of Illinois is as follows:

> "The judgment of the circuit court of Cook County is reversed. However, we see no purpose in remanding the cause for the issuance of a writ of *mandamus* directing the respondent to expunge the offending departmental regulations. [those regulations] Since the statutes upon which the regulations are predicated are invalid, the rules themselves become void and we will not presume that respondent will attempt to act illegally in the face of our finding that the exemption provisions are unconstitutional.
>
> *Judgment Reversed.*"

Therefore the basis for the opinion and the judgment of the district court appealed from, has now disappeared, even if that opinion was correct when it was pronounced.

Appellee Isaacs, Illinois' Director of her Department of Revenue, promulgated new regulations that give effect to the decision of the Supreme Court of Illinois in the *Holland Coal Company* case.

These regulations exscind all reference to exemption from the tax of receipts from sales to the State, her subdivisions or municipalities.

All of them are in the record.

They are very voluminous.

An example of the effect of these regulations is afforded by the concluding paragraph of the Department's Regulation No. 1.

That paragraph, with the former exemptive language now physically stricken in the published regulations, appears in those regulations and in the record (R. 128) in the following language:

> "This rule has been modified by certification of May 22, 1961, by deleting the following paragraph, which is contained until May 22, 1961:
>
> h. which are made to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purpose (see paragraphs 2, 5 and 6 of Rule No. 38 and paragraphs 2 and 3 of Rule No. 40 of the retailers' occupation tax Rules and Regulations)."

On June 9, 1961, appellants filed their petition, suggesting, asserting and pleading the decision of the Supreme Court of Illinois in the *Holland Coal Company* case, and asserting that appellants no longer exempt the proceeds of sales to the State of Illinois, her municipalities and charities from the reach of the tax. Appellants pray that the district court either dissolve its injunction or so modify it that it would not restrain the collection of the tax with respect to sales to the United States and its contractors as long as Illinois did not discriminate against the United States or infringe Federal sovereignty by exempting sales to the State of Illinois, her municipalities or charities.

Appellees moved to dismiss this petition on the ground that since appellants have filed their notice of appeal from the decree in this case, the district court has lost all jurisdiction over the decree. (R. 194.)

In the event the district court dismisses appellants' petition to vacate the decree, appellants will then perfect a separate appeal from that order. A separate jurisdictional statement will be filed in support of that appeal.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

Since Illinois No Longer Exempts Sales to the State, Her Municipalities or Charities From Her Retailers' Occupation Tax, there is no Longer Any Basis For The District Court's Judgment of Injunction. But The Case Is Not Moot Since The Injunction Still Restrains Illinois' Officials From Collecting the Challenged Tax.

As we have made clear in the Statement of the Case, *ante*, the district court's *opinion* held only that Illinois may not collect her Illinois Retailers' Occupation Tax with respect to sales to the United States Government or contractors with that Government *so long as she exempts sales to herself, her municipalities or her charities from the reach of the tax.* But since the effective date of the decision of the Supreme Court of Illinois in *People ex rel. Holland Coal Company* v. *Isaacs*, not yet officially reported, Appendix III, which held that the exemption of sales to the State, her municipalities and charities was itself unconsti-

tutional, Illinois no longer indulges *any* exemptions from the Illinois Retailers' Occupation Tax.

But the district court's *judgment of injunction*, as distinguished from its opinion, is not in terms limited so that it is effective only as long as Illinois exempts from the tax sales to herself, her municipalities and charities.

Therefore the injunction should be dissolved, or modified so that it is not effective as long as Illinois does not exempt sales to herself, her municipalities or charities from the tax or construed so as to be inoperative so long as Illinois does not indulge the exemptions that the district court found infringed Federal sovereignty.

II.

The question of the District Court's Jurisdiction of This Case Under Section 1253.

The district court relied upon this court's most recent opinion in *Livingston* v. *United States*, 364 U. S. 281, affirming *United States* v. *Livingston*, 179 F. Supp. 9, as sustaining its jurisdiction in the instant case.

But, as we note more fully below, the *Livingston* case held that the tax involved in that case an *ad valorem* tax imposed directly upon real and personal property, was in fact a tax against the United States because the DuPont Company was the *alter ego* of the United States with respect to that property.

We distinguish the *Livingston* case, *infra*, after we note and develop the considerations stated below.

A.

The laws of Illinois do afford "a plain, speedy and efficient remedy" for contesting the taxes involved in this case because those laws do not require any deposit of disputed tax funds as a prerequisite to an injunction in the Illinois courts.

The plaintiffs' complaint contains the following assertion::

> "• • • The laws of the State of Illinois do not afford a plain, speedy and efficient remedy for contesting these taxes in the courts of that state because under the laws of Illinois no interest would be paid to the plaintiffs for the amount of any taxes collected by the defendants under the Illinois Retailers' Occupation Tax Act and paid under protest by the plaintiffs if it is determined that the taxes were wrongfully and illegally assessed and collected and that they should be enjoined."

The plaintiffs are simply mistaken in their belief that Illinois law requires the payment of disputed Retailers' Occupation tax or any part of such disputed tax as a prerequisite to injunctive relief.

The plaintiffs have overlooked the leading case of *Owens-Illinois Glass Co.* v. *McKibbin*, 385 Ill. 245, which case the Attorney General, represented by the author of the present brief, lost in the Supreme Court of Illinois. In the *Owens* case, the plaintiff, a manufacturer of, among other items, beer bottles sold such bottles to dram shop keepers. The dram shop keepers in turn supplied these bottles to customers, taking a deposit for them. The deposit was to be refunded if the bottles were returned. The substantive question of Illinois tax law, of course not similar to any question involved in this case, was whether the transfer of the bottles by a dram shop keeper for a deposit was a "resale"

of the bottles, as the glass company contended, or was a mere "bailment" of the bottles, as the Department of Revenue contended.

The plaintiff elected to file a suit for injunction *without paying any part of the disputed tax protest.* The trial court granted a temporary and permanent injunction restraining the collection of the tax.

On appeal, the Attorney General of Illinois earnestly contended that since the Illinois "Act in relation to the payment and disposition of moneys received from or on behalf of the State" (Ill. Rev. Stats. 1959, Ch. 127, Pars. 170-176 (a)) provides for payment under protest of disputed taxes, and since the Retailers' Occupation Tax provides a method of contesting taxes before an administrative tribunal without any payment thereof, the plaintiff was not entitled to an injunction without the payment of the disputed tax and without any bond.

This contention was rejected by the Supreme Court of Illinois. The opinion is quite long and the whole of it is important. However, the following two paragraphs distill its essence. The court said at p. 259:

> "We can see no substantial distinction between the Director of Finance taking a course of action which determines an occupation is taxable, when it is not in fact taxable, and of levying an unauthorized tax. In either event unless the action is restrained the taxpayer is required to pay unauthorized taxes. The same is true with respect to the acts of appellant requiring appellee to pay on sales contrary to rule 51. Thus, in *People's Gas Light and Coke Co.* v. *Stuckart*, 286 Ill. 164, the State Board of Equalization attempted to collect capital stock tax in disregard of the rules of such board laid down for ascertaining such taxes, and it was held that in such case a court of equity would enjoin the tax as unauthorized and arbitrarily assessed in disregard of the board's rules for ascertaining value.

> "The actions of appellant compelled appellee to either make a return and produce its records, or bring its suit in equity to enjoin the action of the Director as amounting to a determination that its occupation was taxable. Since the remedies were cumulative plaintiff had a right to bring its complaint for injunction rather than to rely upon the procedure provided by the statute."

Therefore the plaintiffs have in the State courts of Illinois *precisely the same remedy that they seek in this court*, namely, a right to an injunction if in fact the disputed tax is not due.—They have this remedy without paying *or* depositing any part of the tax.

Moreover, the plaintiffs have another remedy under the laws of Illinois that requires the payment of no tax whatever.

Moreover, the plaintiff Olin Mathieson Corporation may, *without the payment of any sum whatever*, dispute any assessment of the tax before the Department of Revenue, with adequate opportunity for review of adverse action by that Department in the Illinois circuit or superior court and with a right of direct appeal to the Supreme Court of Illinois. This method is provided by the Retailers' Occupation Tax Act (Ill. Rev. Stats. 1959, Ch. 120, Pars. 443 and 451) and is regularly availed of, often with success, by Illinois taxpayers who dispute the claim of the Department of Revenue that their transactions measure the Illinois Retailers' Occupation Tax.

Furthermore, with respect to taxes to become due in the future, both plaintiffs (if the United States is a proper party plaintiff at all, which we dispute under Point II of this memorandum) have a right to a declaratory judgment in the State courts, with an injunction protecting the *status*

quo during the pendency of the proceedings without the payment of any part of the disputed tax. The Declaratory Judgment Act is found in Ill. Rev. Stats. 1959, Ch. 110, Par. 57.1.

Thus it is clear that if the plaintiffs have any substantive rights with respect to the taxes involved in this case, their remedy in the State courts is "plain, speedy and efficient" and requires *no payment* of *any part* of the disputed tax under protest. *United States and DuPont Co.* v. *Livingston*, 179 F. Supp. 9, *aff'd.* June 27, 1960, not yet officially reported, was different. There the court held that the tax was imposed *directly upon the United States.* Of course the United States is a proper party to enjoin the collection of a tax directly laid upon itself.

Section 1341 of the Judicial Code provides as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

B.

Section 1341 of the Judicial Code applies to the United States in this case.

On the application for a temporary restraining order, the plaintiffs relied upon a decision of a three-judge District Court in the Eastern District of South Carolina, *United States and DuPont Company* v. *Livingston*, 179 F. Supp. 9. The judgment in that case was affirmed by this Court on June 27, 1960, by a *per curiam* order without opinion.

The plaintiffs cite the *Livingston* case as sustaining Federal jurisdiction. We do not understand them to cite the case as pertinent on the merits.

We carefully discuss the *Livingston* case:

In that case the United States and the DuPont Company sued as joint plaintiffs to enjoin the collection of a tax laid by South Carolina upon the gross receipts from sales of merchandise to the DuPont Company. But in the *DuPont Company* case, as the court makes clear, the DuPont Company had made a contract with the United States Government under which the Company received only one dollar for the undertaking of a vast project concerned with the production of atomic energy. The Government assumed all of the expenses, hazards and risks of this great enterprise. The court of three judges held that since the Company could not possibly make a profit and could not possibly suffer any loss, it was in effect an *alter ego* of the United States Government. The court held that the tax was laid in effect directly upon the United States and was therefore unconstitutional. No question of discrimination was involved.

Indeed the court was careful to say that the immunity of the United States to the tax did not rest upon any discrimination by South Carolina against the Federal Government but existed because the State may not lay any tax, even a non-discriminatory exaction, directly against the United States.

In sustaining jurisdiction, two of the three judges of the District Court, one judge dissenting, relied upon *each* of two *separate and independent* grounds:

First: That since South Carolina required prepayment of taxes under protest and did not allow interest after taxes were refunded, there was no "plain, speedy and efficient" remedy in the South Carolina courts, and

Second: By way of an additional supposed ground of jurisdiction, the *District Court (not* the Supreme Court of

the United States, which rendered no opinion) said that Section 1341 of the Judicial Code was not intended to apply to suits in which the United States was a plaintiff.

The opinion of the District Court was affirmed by this court without opinion on June 27, 1960.

Although the District Court's opinion in the *Livingston* case does support the instant plaintiff, there is no means of discerning whether the Supreme Court of the United States adopted the first ground of jurisdiction vouchsafed by the District Court's opinion, present in that case but *absent in this one*, that South Carolina did not afford a "plain, speedy and efficient" remedy or the second ground, that is, the argument that Section 1341 of the Judicial Code was not intended to apply to suits by the United States.

Affirmance by this court without opinion does not constitute the adoption of the District Court's opinion.

On the second alleged ground of jurisdiction, that is, that Section 1341 does not apply to suits by the United States, we think that Judge Timmerman's dissenting opinion embodies a sounder exposition of law than does the opinion of the District Court's majority. We therefore adopt and commend to this court, not, of course, as controlling but as most persuasive, the following language of Judge Timmerman in 179 F. Supp. 9, at pp. 25 and 26:

> "It is no answer to the jurisdictional issue to say that the United States is not mentioned in Section 1341 and, therefore, that said Section does not limit or defeat the government's right to avail itself of the district court's jurisdiction. That is a *non sequitur*. The government cannot avail itself of a non-existing jurisdiction, and no one is arguing that the United States cannot avail itself of a jurisdiction that does exist. The Attorney General of the United States cannot invest a court pleasing to him with jurisdiction

to hear an issue simply because he wishes to avoid a court that does have jurisdiction. He must take that issue to a court that has jurisdiction to hear it. It isn't the government's right to invoke a jurisdiction that exists, but it is the government's right to invoke a jurisdiction that doesn't exist that is in question. Certainly this case could not have been brought in the original jurisdiction of the Circuit Court of Appeals. The simple reason for that is that Congress has not conferred power on the Circuit Court to hear such cases as a part of its jurisdiction. Congress created the Court of Claims that sits in Washington and defined its jurisdiction. That Court cannot exceed the jurisdiction which Congress intrusted to it even though the Attorney General of the United States might want it to do so. Here we have an act of Congress that prohibits this Court from doing what the plaintiffs have asked it to do, to-wit: to enjoin the assessment, levy and collection of the State's sale and use taxes, although State law provides a plain, speedy and efficient remedy for determining the validity of such taxes. The issue here is not whether the parties themselves are within the jurisdiction of this Court. It is that this Court doesn't have jurisdiction of the subject matter because an Act of Congress denies it such jurisdiction. Since the district courts are statutory courts their jurisdictions are established by statute. It makes no difference who may request a district court to do so, it cannot legally go beyond the limits of its jurisdiction as fixed by Congress."

The general rule that one sovereign is not ordinarily included within legislation that works to that sovereign's disadvantage should not be applied in the delicate balance that must subsist between the respective spheres of Federal and State supremacy.

Nor should it be applied in a case in which the court's jurisdiction is wholly statutory.

C.

The United States is not a proper party plaintiff in this case either in the Federal or the State Courts because it has no legally justiciable interest in the payments of the tax paid by the plaintiff Olin Mathieson Corporation. This is true whether Olin Mathieson Corporation does or does not owe the disputed tax.

Neither plaintiff suggests, nor could it be the fact, that Illinois or any of Illinois' officers or agencies is imposing or attempting to collect any tax from the United States Government.

All that the United States Government is in effect contending is that Olin Mathieson Corporation and certain other Illinois persons and corporations who purvey goods to the United States either are paying or are threatened with the assessment of Illinois taxes that Olin Mathieson Corporation and other Illinois retailers do not owe.

If these taxpayers choose to pay taxes that are not due, the United States has no right to prevent the payment of those taxes although it may refuse to reimburse its purveyors for taxes needlessly and recklessly paid. And of course it may as a condition to doing business with such taxpayers insist that they contest those taxes, just as it might insist that they attempt to reduce the wages of their employees, purchase supplies from cheaper sources than they are now using or otherwise conduct their business according to the requirements of the United States.

We submit that if Olin Mathieson Corporation is increasing its costs by unnecessary payments of any kind, whether of salaries to its officers, of prices for its materials or taxes, license fees or other exactions that are not due, it seems clear that the United States may not enjoin the third

party recipients of such unnecessary payments for accepting them.

This would be true even if the third party recipient were a private party. *A fortiori* it is true where the third party is a sovereign state.

In short, there is no legally cognizable relationship between the Government of the United States and that of the State of Illinois with respect to any part of the Illinois Retailers' Occupation Tax Act.

To hold that the United States has a justiciable interest in a dispute between its purveyors and third persons, would intrude the United States into private enterprise in a way that is unprecedented even under the most liberal contemporary view of the role of the businessman and his Federal government.

D.

With respect to the plaintiff Olin Mathieson, this suit is one against the State of Illinois and is inhibited by the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Department of Revenue is an arm of the State of Illinois. A suit against it is within the inhibition of this Amendment. Suits against State *agencies*, as distinct from suits against State officers are so rarely attempted that it is

difficult to find such cases. But see *Dunich* v. *Kansas Highway Commission*, 21 F. Supp. 822, holding that a suit against a State highway commission is a suit against the State.

III.

The District Court's Opinion and Judgment Were Erroneous On The Merits.

Under Point I of these *Reasons Why The Questions Presented Are Substantial*, we have demonstrated that Illinois no longer indulges the exemptions that the district court found rendered the taxes involved in this case discriminatory against the Federal Government, the injunction should be dissolved, modified or construed as not presently operative.

Under Point II, *ante*, we demonstrated that the district court did not have jurisdiction of this case.

But under this Point, we show that the district court's opinion and judgment are before this court on this appeal on the merits, that opinion and that judgment are erroneous.

In *Alabama* v. *King & Boozer*, 314 U. S. 1, this court sustained a tax measured by "2% on the gross retail sales' price of tangible personal property" with respect to sales made by King & Boozer to contractors with the Government, the tax being levied against King & Boozer. The statute, however, required King & Boozer to collect the tax from the contractors. The contractors' contracts with the United States Government were upon a "cost plus" basis.

It was argued that the incidence of the tax was really upon the United States Government. This court recognized this to be true but nevertheless sustained the tax

On argument for temporary restraining order by Judge La Buy, counsel for the United States disclaimed any contention that the *King and Boozer* case is not the law or should be overruled.

In *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, not yet officially reported, 80 S. Ct. 474, on which the plaintiffs rely in this case, this court struck down a property tax which, though levied against a private lessee of property owned by the United States, was measured by the value of the United States Government's property.

The tax involved in this case was not a tax on property owned by the United States, Cf., the *Phillips Chemical Company* case, nor was it laid upon the normal taxpayer which was in all relevant respects nothing more than an *alter ego* or *alias* for the United States itself, Cf., the *Livingston* case, but is a tax upon the privilege of engaging in retail mercantile businesses in Illinois.

Therefore the exemptions involved in this case do not come within the ambit of any of the principles invoked by appellees or deemed applicable to this case by the district court.

Conclusion.

The questions involved in this case are substantial. This court should note probable jurisdiction and entertain this case on primary consideration thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, Assistant Attorney General of the State of Illinois and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 25th day of July, 1961, I served copies of the foregoing Jurisdictional Statement on the appellees, as follows:

By mailing of five copies of said Jurisdictional Statement to

Honorable Robert Kennedy, Attorney General of the United States
Department of Justice
Washington (25) D. C.

Honorable Archibald Cox, Solicitor General,
Department of Justice
Washington (25) D. C.

James P. O'Brien, Esq.
United States Attorney for the Northern District of Illinois
United States Courthouse, Room 450
Chicago, Illinois

John H. Caruthers, Esq.
East Alton, Illinois
Attorney for Olin Mathieson Chemical Corporation

Thomas F. Scully
Prudential Building, 29th Floor
Chicago, Illinois.

in duly addressed envelopes, postage prepaid.

RAYMOND S. SARNOW,
Assistant Attorney General of the
State of Illinois,
One of Attorneys for Appellants.

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Filed February 24, 1961

United States of America and Olin Mathieson Chemical Corporation vs. Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue	No. 60 C 1365

Before KNOCH, Circuit Judge, LABUY and ROBSON, District Judges.

Jurisdiction to hear the above matter is invoked pursuant to §§ 1345, 1331 and 1332 of the Judicial Code, 28 U.S.C.A. The complaint prays that this court declare the provisions of the Illinois Retailers' Occupation Tax Act (Ch. 120, §§ 440 ff., Smith-Hurd Ann. Stats.) unconstitutional, void and of no effect in so far as they permit taxation of receipts from sales of tangible personal property to the United States or the taxation of such sales, and to enjoin the assessment and collection thereof.

Briefly, it is alleged that for a period of three months in 1957 the plaintiff, Olin Mathieson Chemical Corporation, designed, manufactured, sold and delivered in Illinois to the United States Air Force aircraft engine starter cartridges required by the United States for national defense; that the amount paid by the United States therefor was $901,204.08; that the State of Illinois claims an occupation

tax thereon in the sum of $27,036.12, which amount has not been paid because the United States has instructed Olin Mathieson to refuse to pay any part thereof; that several hundred persons and firms in addition to Olin Mathieson are engaged in making sales at retail of tangible personal property in Illinois to the United States which property is and will be required to further the national defense and perform other governmental functions; that the United States has instructed these vendors to refuse to pay taxes on receipts from sales to it.

It is further alleged that under the provisions of existing contracts, the United States is obligated to reimburse Olin Mathieson and other vendors if they should be required to pay any taxes under the Act. The parties have stipulated that in addition to Olin Mathieson there are more than 1440 persons or firms in the State of Illinois engaged in sales to agencies of the Department of Defense, including the United States Air Force, United States Army, United States Navy, and the Military Petroleum Supply Agency; that the total amount of these contracts is in excess of $623,655,000.

The United States contends that the inclusion of such a tax on proceeds from sales to the Federal Government is in violation of the Constitution of the United States because (1) it results in discrimination against the United States and those with whom it deals in that the Illinois Retailers' Occupation tax is not imposed on proceeds from sales made "to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid. . . ." (§ 441, Ch. 120, Smith-Hurd Ann. Stats.), and (2) violates the immunity from state and local taxation to which the United States is entitled. It is also stated that there exists no plain, speedy and efficient remedy which plaintiffs may pursue in the courts of Illinois.

Defendants, by motion to dismiss, assail the jurisdiction of this court to entertain this controversy. The reasons therefore are (1) the United States is not a proper party plaintiff for it is not a taxpayer under the Illinois law; (2)

§ 1341, 28 U. S. C. A., proscribes the jurisdiction of this court to enjoin or otherwise prevent the collection of taxes claimed to be due under state law and said section applies to suits brought by the United States as well as suits brought by others; (3) plaintiffs have a plain, speedy and efficient remedy for contesting the liability for such taxes in the state courts; and (4) the plaintiff, Olin Mathieson, is within the inhibition of the Eleventh Amendment to the Constitution of the United States and cannot bring suit against the State of Illinois.

In the alternative, defendants urge dismissal of the claim on its merits for the reason (1) the Illinois occupation tax applies to all retailers of the class described in the complaint who are engaged in the transactions alleged therein and therefore these taxes do not discriminate against the sovereignty of the United States; and (2) it fails to state a claim upon which relief can be granted.

In *Livingston* v. *United States and duPont*, (D. C. S. C., 1959) 179 F. Supp. 9, aff'd per curiam, 364 U. S. 281, reh. den. 364 U. S. 855, the court held that § 1341, 28 U. S. C. A., proscribing federal court jurisdiction in suits to enjoin collection of taxes where a plain, speedy and efficient remedy exists in the state courts is not applicable to the United States. It is implicit in § 1341, as it is in any action brought by the sovereign, that the interest of the United States must be of the kind to support its presence as a party litigant. *United States* v. *San Jacinto Tin Co.*, (1887) 125 U. S. 273, 285; *United States* v. *Beebe*, (1887) 127 U. S. 338.

Where a taxpayer is singled out and treated differently from all those similarly situated because he transacts business with the United States, as is alleged here, such action discriminates not only against him but also against the United States. *Pacific Co.* v. *Johnson*, (1932) 285 U. S. 480, 493; *United States* v. *Allegheny County*, (1943) 322 U. S. 174; *United States* v. *City of Detroit*, (1957) 355 U. S. 466, 473; *Phillips Co.* v. *Dumas School Dist.*, (1960) 361 U. S. 376. Furthermore, the United States is a proper party plaintiff because it has a substantial pecuniary in-

terest in the outcome of this suit for it is obligated by contract to reimburse the taxpayer.

We conclude that the interest of the United States in this suit is direct and substantial and that it is a proper party litigant. We are further persuaded by the reasoning in the *Livingston* case,* *supra*, that § 1341 does not deprive this court of jurisdiction. *United States* v. *United Mine Workers of America*, (1947) 330 U. S. 258; *United States* v. *Woodworth*, (C. A. 2, 1948) 170 F. (2nd) 1019.

In order to resolve the contentions of the defendants in their entirety, however, we proceed to determine the efficacy of the argument that a plain, speedy and efficient remedy exists in the courts of Illinois. Such determination bears also on the exercise of judicial discretion which must guide us, as a federal court of equity, in determining whether or not we should grant or withhold a remedy which is within our equity power to give. *Toomer et al.* v. *Witsell et al.* (1948) 334 U. S. 385; *Great Lakes Dredge & Dock Co.* v. *Huffman*, (1942) 319 U. S. 293, 301. The defendants rely on *Owens-Illinois Glass* v. *McKibben*, (1943) 385 Ill. 245, to establish that Olin Mathieson has recourse to the courts of Illinois to enjoin the tax collection without the necessity of depositing the tax moneys due. In *Goodyear Tire & Rubber Co.* v. *Tierney*, (1952) 411 Ill. 421, 427, the Illinois Su

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* "There appears no good reason why the Congress should deny the United States the protection of the equitable powers of her own courts in a situation such as that with which we are now concerned, and it has been generally and broadly held that it did not do so when it enacted. . . what is now par. 1341 . . . We conclude that 28 U. S. C. A. § 1341 does not deprive this court of jurisdiction of this action by the United States by which it seeks protection of its sovereign immunity from taxation. (pp. 11-12)

". . . Here the sole question is whether or not the United States is the real purchaser and user of the purchased articles so as to make their purchase and use immune from state taxation. That question arises under the Constitution of the United States and its answer is not dependent upon the resolution of any question of state law. It is our duty to consider the federal question, and there is no basis for a remission of the plaintiffs to the state courts." (p. 12)

preme Court ruled that application for injunction is available only to a taxpayer when the tax is unauthorized by law, i. e., imposed when not provided for, or is levied on property which is exempt. *Owens-Illinois Glass* v. *McKibben, supra*, page 256; *Acme Printing Co.* v. *Nudelman*, (1939) 371 Ill. 217. In the instant case it is conceded by plaintiffs that Olin Mathieson is a retailer subject to the occupation tax of Illinois. Therefore, it may not invoke the remedy of injunctive relief in the courts of Illinois.

A remedy by way of protest, hearing and court review are provided for by the Illinois Retailers' Occupation Tax Act and may be pursued without prior payment of any part of the assessment. If a taxpayer fails to pay such tax at the time he files his return, he incurs a penalty of 10 per cent on the amount of the tax due. §§ 442, 444, Ch. 120. In addition, § 444a provides that the Department shall have a lien on all present and subsequently acquired real and personal property of the taxpayer for any unpaid tax and penalty, which lien becomes effective upon the termination of any review proceedings. A taxpayer may file suit under the Administrative Review Act without payment or deposit of the moneys due, but is required to file a bond in the amount of the unpaid tax and penalty or, in lieu of such bond, an order will be entered imposing a lien upon the taxpayer's present and subsequently acquired real and personal property. § 451, Ch. 120. The Act does not provide that the taxpayer may recover the cost of such bond. A failure to provide interest on a tax refund has been considered by the courts as evidence that a taxpayer does not have a plain, speedy and efficient remedy. (*United States* v. *Livingston, supra*; cf. *Southern Ry. Co.* v. *Query*, (D. C. S. C., 1927) 21 F. (2d) 333, 342). It is the court's view that failure to provide for cost of the required bond is analogous to a failure to provide for recovery of interest on a tax refund.

It is urged that plaintiffs have available the remedy of declaratory judgment. The availability of that remedy in tax cases is uncertain. In *Goodyear Tire & Rubber Co.* v. *Tierney, supra*, page 430, the Supreme Court of Illinois

observed that courts should proceed cautiously in tax cases in order to avoid interference with collection of revenues and "the cases are often such that the courts ought to deny declaratory relief". It also stated:

> "While there is a sharp division of authority on the question of whether the existence of another adequate remedy precludes proceedings under the Declaratory Judgments Act in tax matters, we believe that those decisions which hold that the existence of another adequate remedy is a bar to declaratory action are supported by better reason and sounder policy."

We are of the opinion that the remedies available in the courts of Illinois to the plaintiff, Olin Mathieson, are not plain, speedy and efficient. The circumstances of this case, as above stated, completely negate a possibility that there exists an adequate remedy at law such as would, under the decision in *Toomer et al.* v. *Witsell et al., supra*, preclude relief upon the instant application to this Court.

We are also of the opinion that the Eleventh Amendment to the Constitution of the United States is not applicable in this case. A suit to restrain unconstitutional action threatened by an individual who is a state officer, as is the defendant Director of Revenue, is not an action against the State. *Georgia R. Co.* v. *Redwine*, (1951) 342 U. S. 299, 304. It is immaterial that the Department of Revenue is also a defendant. Its joinder must be considered in the light of the issues involved and the relief sought. *Moline Tool Co.* v. *Department of Revenue*, (1951) 410 Ill. 35, 37; *Ex parte Young*, (1907) 209 U. S. 123, 155. The action sought to be restrained as being in violation of the Federal Constitution is the collection of the occupation tax; a duty dischargeable only by the officer empowered to execute and discharge the functions of the Department of Revenue. No other activity of the state is involved. Therefore, we hold that the Department of Revenue is a nominal party and that this suit is within the rule applied to a state officer seeking to enforce an alleged unconstitutional act.

For the above and foregoing reasons, the motion of defendants to dismiss the aforesaid complaint for lack of jurisdiction is overruled.

We next proceed to a consideration of defendants' motion to dismiss the cause on its merits.

The Attorney General of the State of Illinois leans heavily on *Alabama* v. *King & Boozer*, (1941) 314 U. S. 1, as being directly in point. Plaintiffs dispute its applicability on the authority of *Kern-Limerick* v. *Scurlock*, (1953) 347 U. S. 110, 119, which expressly stated that the *King & Boozer* case left open the issue of the immunity of the United States as a purchaser.

Neither of these cases is controlling or decisive of the question presented in this case. The Alabama statute in *King & Boozer* and the Arkansas statute in *Kern-Limerick* required that the seller of the property collect the tax from the purchaser. In each of these cases, the court was called upon to decide whether, under the facts of the case, the United States was the purchaser upon whom fell the legal incidence of the tax. In *King & Boozer* it was held that the United States was not the purchaser and therefore the Alabama tax was not invalid as impinging upon the immunity of the sovereign to be free from taxation. In *Kern-Limerick* it was held that the United States was the purchaser and the legal impact of the Arkansas statute therefor fell upon a sovereign who is immune from taxation by the state.

Under the Illinois statute, with which we are concerned, it must be conceded that by virtue of the statutory language the legal incidence of the tax falls upon Olin Mathieson, a retailer engaged in the occupation of selling tangible personal property. No statutory provision compels him to collect the tax from the purchaser who, in this instance, is the United States. In the light of the decisions of the Supreme Court of the United States since *Panhandle Oil* v. *Knox*, (1927) 277 U. S. 218, we do not hold that Olin Mathieson is an agent or instrumentality of the Federal Government so as to result in an imposition of this tax upon the

sovereign. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *United States* v. *City of Detroit, supra*, pages 471-473; *Curry* v. *United States*, (1941) 314 U. S. 14. Therefore, we are not concerned here with the principle of sovereign immunity from local taxation and such doctrine does not per se prohibit the assessment of the instant tax.

In considering the validity of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Comm'n*, (1932) 286 U. S. 276, 280. The particular name which a state legislature may give to a money payment commanded by statute is not controlling when its constitutionality is in question. *Carpenter* v. *Shaw*, (1929) 280 U. S. 363, 367-368; *United States* v. *City of Detroit, supra*. The Illinois Act, by its terms, imposes the tax "upon persons engaged in the business of selling tangible personal property at retail" which falls on all who come within that classification—that is, those who sell at retail to the State of Illinois and its subdivisions and those who sell to the Federal Government as well as those who sell to private citizens and corporations.

Certain basic principles must be recognized in our approach to the problem before us. There is a strong presumption in favor of the validity of a legislative classification if any state of facts can reasonably be conceived to sustain it and it is presumed that such state of facts exist. Statutes which tax one class while exempting another class necessarily impose a greater burden upon the person taxed than would be the case if the exempted class would be included. Such statutes do not create an inequality in the constitutional sense if all in the same class are included and treated alike. *Hart Refineries* v. *Harmon*, (1928) 278 U. S. 499, 502. The legislature has the power to grant an exemption according to its views of public policy subject only to the limitation that the exemption and the classification upon which it is based be reasonable and not arbitrary. Consequently, we do not question the power of the Illinois

legislature to grant an exemption to a retailer who deals with it and its political subdivisions. Indeed, such action has the beneficent objective of reducing costs of governmental administration to the benefit of its citizens.

In our view, however, a retailer who deals with the Federal Government falls within the same class as a retailer who deals with the State of Illinois. If an exemption is made from the general classification of retailers who sell tangible personal property on the legally justifiable basis of dealing with the State of Illinois, it is because such retailer deals with a governmental entity. By exempting a retailer who deals with the State of Illinois and its political subdivisions, the legislature has subdivided retailers who transact business with governmental entities into two divisions—those who deal with the State of Illinois and its subdivisions and those who deal with the United States. To be valid, such an exemption must fall alike on all similarly situated and must include retailers who deal with the Federal Government.

A reasonable consideration of difference or policy between these retailers must exist otherwise the classification is either capricious or arbitrary. *Phillips Co.* v. *Dumas School Dist.*, *supra*, page 383. No enlightenment has been offered as a basis for the differentiation. It is difficult for us to perceive a reasonable distinction which grants one freedom from contributing to the cost of government and imposes the burden upon the other. Further, the imposition of the tax upon one and not the other permits the State to deal with retailers at a lower cost and imposes an increased cost upon the Federal Government dealing with the same class of persons. Assuming that the statutory exemption may have the laudable public purpose of reducing governmental costs, it is equally applicable to the Federal Government thus benefiting all citizens of the United States, including the citizens of the State of Illinois.

Not only is the Federal Government discriminated against as a governmental unit in contrast to the exemption granted

> "the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid"

but it is further discriminated against in contrast with many non-governmental entities, specifically

> "any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes."

The United States Supreme Court in *Phillips Chemical Co. v. Dumas Independent School District*, *supra*, condemns such discrimination. It stated:

> "a State may not single out those who deal with the government, in one capacity or another, for a tax burden not imposed on others similarly situated. (p. 383) . . . it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. (p. 385) The differences between the classes, at least when the Government's interests are weighed in the balance seem too impalpable to warrant such a gross differentiation . . . a state tax may not discriminate against the Government or those with whom it deals." (p. 387)

For the above and foregoing reasons, we conclude that 441, Chapter 120, Smith-Hurd Ann. Stats., as applied here, results in the imposition of a tax which discriminates against the Federal Government and those with whom it deals and is, therefore, unconstitutional.

The above and foregoing opinion of the Court constitutes the Findings of Fact and Conclusions of Law. Counsel should present an appropriate order within five (5) days. Feb. 23, 1961.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America and Olin Mathieson Chemical Corporation vs. Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue	No. 60 C 1365

Order.

This cause coming on to be heard upon the complaint o the plaintiffs, United States of America and Olin Mathi son Chemical Corporation, for the entry of a decree e joining and restraining the defendants, Department of Re enue of the State of Illinois and Andrew Fasseas, Direct of Revenue, and all persons acting under their authori and supervision, from assessing or collecting any tax und the provisions of the Illinois Sales Tax or Retailers Occ pation Act of June 28, 1933, as amended; (Ill. Rev. Sta 1959 Ch. 120, § 440 ff), against or from plaintiff, Ol Mathieson Chemical Corporation or anyone else, with r spect to any sales of tangible personal property which a of them have made, or hereafter may make to the Unit States, or any of its agencies or instrumentalities, or wi respect to any proceeds received from the United Stat with respect to any such sales;

And a final hearing having been had by a statutory thre judge court, pursuant to Sections 2281 and 2284 of Ti 28, United States Code, and upon consideration of t

Amended Complaint, the Stipulation of Facts herein filed on August 31, 1960, defendant's written Motion to Dismiss Plaintiffs' Complaint for Want of Jurisdiction, or in the Alternative for Failure to State a Cause upon Which Relief May be Granted, the oral motions of the plaintiffs and defendants for judgment on the pleadings and for summary judgment, and the oral stipulations of the parties made in open Court on October 6, 1960, and oral arguments and written briefs of counsel;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Plaintiffs' motions for judgment on the pleadings and summary judgment be, and the same are hereby granted; and defendants' motions to dismiss and for judgment on the pleadings and for summary judgment be, and the same are hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the opinion of this court as entered on this date, and which said opinion shall constitute the Findings of Fact and Conclusions of Law of this court in this matter, that the Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue, and all persons acting under their authority and supervision be, and they are hereby permanently restrained and enjoined from the making or enforcing any assessment or collection under, or in any other way applying or enforcing the provisions of Section 2 of the Illinois Retailers Occupation Tax Act, Act of June 28, 1933, (Ill. Rev. Stat. 1959, Ch. 120, Sec. 441), against the plaintiff, Olin Mathieson Chemical Corporation, or anyone else with respect to any sales of tangible personal property which any of them have made, or hereafter may make, to the United States, or any of its agencies or instrumentalities, or with respect to any proceeds received from the United States with respect to any such sales;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of the Illinois Sales Tax Act or Retailers Occupation Tax Act of June 28, 1933, as amended, (Ill. Rev. Stat. 1959, Ch. 120 § 440 ff) be, and the same are hereby decreed to be violative of the Constitution of the United States and, therefore, void and of no effect insofar as they provide for

the taxation of receipts from the sales of tangible personal property to the United States or for the taxation of such sales.

ENTER:

APPENDIX III.

(Holland Coal Opinion.)

Docket No. 36480—Agenda 46—March, 1961.

The People ex rel. Holland Coal Company, Appellant, v. *Theodore J. Isaacs, Director of Revenue, Appellee.*

MR. JUSTICE HOUSE delivered the opinion of the court:

Holland Coal Company, an Illinois corporation, brought this action against the Director of the Department of Revenue seeking a declaratory judgment that certain exemption provisions of the Retailers' Occupation Tax Act and the Illinois Use Tax Act are unconstitutional and void and requesting the issuance of a writ of *mandamus* compelling the director to expunge departmental rules and regulations implementing the exemptions. On motion of the Director, the circuit court of Cook County struck the relator's complaint. The latter elected to abide by its pleading and the court thereupon dismissed the suit with prejudice, on the merits and at relator's cost. The revenue and the constitutionality of statutes are involved.

In 1953 section 2 of the Retailers' Occupation Tax Act was amended to exempt from the measure of the tax "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes." (Ill. Rev. Stat. 1953, chap. 120, par. 441.) When the Use Tax Act was enacted in 1955, the legislature employed identical language to exempt from such tax the State, its counties, political subdivisions, municipalities, governmental instrumentalities or institutions and charities. (Ill. Rev. Stat. 1955, chap. 120, par. 4393.) Rules and regulations have been promulgated by the De-

partment of Revenue to implement the exemptions provided by the statutes.

The relator contends that the exemption provision in the Retailers' Occupation Tax Act violates the uniformity provision of section 1 of article IX of the Illinois constitution. It argues that since the tax is imposed upon persons engaged in the business of selling tangible personal property at retail, a lack of uniformity is created within this class because some retailers will be taxed on none or less than all of their sales while others will pay on the full amount of their sales depending on the character of purchaser.

The uniformity provision of section 1 of article IX provides that a tax must be "uniform as to the class upon which it operates." Since the exemption provision does not operate in a vacuum, a determination of whether it creates a lack of uniformity cannot rest merely on an examination of the statute.

In stating the specific class upon which a tax is to be imposed, the legislature may define a general class and specifically remove a subclass (see *Bode* v. *Barrett*, 412 Ill. 204; *Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55.) or it may merely define a subclass without naming the general class. See *People* v. *Deep Rock Oil Corp.*, 343 Ill. 388.) "Persons engaged in the business of selling tangible personal property at retail" is a general class which the exemptive provision has in effect subclassified according to the nature of the purchaser. The legislative intent is clear that the retailers' occupation tax should apply to that specific class of persons engaged in the business of selling tangible personal property at retail to other than the purchasers named in the exemptive provision. This specific class is the same whether it is defined as we have just done or by the use of an exemption as the legislature has done. The basic question is not the manner in which the class to be taxed has been defined, however, but whether there is any reasonable basis for the classification.

The legislature in levying an occupation tax has great latitude in establishing the class to which the tax shall ap-

ply. (*Reif* v. *Barrett*, 355 Ill. 104; *Ohio Oil Co.* v. *Wright*, 386 Ill. 206; *McGrath* v. *City of Chicago*, 309 Ill. 515.) The classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed, (*Ohio Oil Co.* v. *Wright*, 386 Ill. 206; *City of Chicago* v. *Ames*, 365 Ill. 529,) and they must bear some reasonable relationship to the object of the legislation, (*Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55,) or to public policy, *Reif* v. *Barrett*, 355 Ill. 104.

We do not agree with relator's assertion that basing the classification on the identity of the purchaser shows that the classification is arbitrary and capricious. It is the common and accepted practice of persons subject to the retailers' occupation tax to quote and collect the tax separately from the selling price. In such circumstances the burden of the tax is shifted forward to the purchaser. The obvious purpose of the legislature in enacting the exemption was to protect governmental units and charities from the burden of the tax that is shifted to them. Reduced costs of government and reduced costs of charities, which relieve the State of many burdens it would otherwise be obliged to bear, will result when these purchasers can deal with retailers who are not subject to the tax. Although the classification is based in part on the identity of the purchaser, it takes into account the economic effect of the tax. We believe that such classification is not arbitrary or capricious but bears a reasonable relation to public policy.

It is also contended that the 1953 exemption in the Retailers' Occupation Tax Act and the identical and companion exemption granted in the Use Tax Act are unconstitutional because they discriminate against the Federal government. It is well settled that uniformity may be violated by including within a class those not in fact within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194,) as well as by excluding from a class those properly belonging to it. *Lippman* v. *People*, 175 Ill. 101; *City of Chicago* v. *Ames*, 365 Ill. 529; *Ohio Oil Co.* v. *Wright*, 386 Ill. 206.

The relator has set out in full in its brief an opinion rendered on February 24, 1961, by a bench of three judges sitting in the United States District Court for the Northern District of Illinois in which it was held that Illinois may not tax retail sellers of tangible personal property with respect to sales to the United States Government or to contractors with the Government so long as Illinois exempts from the measure of that tax similar sales to the State of Illinois, its agencies, instrumentalities, municipalities and charities. (*United States* v. *Department of Revenue of Illinois*, 191 F. Supp. 723, No. 60 C 1365.) The district court found that there was no reasonable basis for putting those retailers who deal with the Federal government in a class different from those who deal with the State, its agencies, municipalities and charities. Since the exemption places those who deal with the Federal government in a class different from that of those who deal with the governmental units and charities defined in the exemption, the court held the imposition of the tax with respect to sales to or for the use of the Federal government works an unconstitutional discrimination against, and therefore, infringes, the sovereignty of the Federal government, so long as similar sales to the State, its counties, municipalities and charities do not measure the tax.

The most recent opinion of the Supreme Court on this subject is *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 80 S. Ct. 474, 4 L. ed. 2d 384. In that case a tax had been imposed upon the lessees of real estate and was measured by the full value of the property. The lessees of the State or one of its political subdivisions were not taxed however. The court could find no reasonable basis to support the Government's lessees being placed in a class different from that of the lessees of the State and its agencies. In holding that the tax could not be exacted from the Government's lessees the court stated. "* * * it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U. S. 376, 385.

While the Attorney General has pointed to several facts which distinguish the *Phillips Chemical Co.* case from this one, we believe the distinction is without a difference.

The judgment of the circuit court of Cook County is reversed. However, we see no purpose in remanding the cause for the issuance of a writ of *mandamus* directing the respondent to expunge the offending departmental regulations. Since the statutes upon which the regulations are predicated are invalid, the rules themselves become void and we will not presume that respondent will attempt to act illegally in the face of our finding that the exemption provisions are unconstitutional.

Judgment reversed